

September 21, 2006

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

**Appeal**

Name of Petitioner: Arlie B. Siebert

Date of Filing: January 27, 2006

Case Number: TFA-0146

Arlie B. Siebert filed an Appeal from a determination that the Office of Intelligence of the Department of Energy issued on December 14, 2005. In that determination, the Office of Intelligence responded to a request for information that Mr. Siebert submitted to the DOE pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by neither confirming nor denying the existence of the records Mr. Siebert sought. This Appeal, if granted, would require the DOE to identify any document responsive to Mr. Siebert's request and release all non-exempt information to him.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The appropriateness of the type of response that the Office of Intelligence provided to Mr. Siebert has been addressed by the Federal courts. In this Decision we review the nature of the response and reach a determination that the response was proper.

**I. Background**

In his request dated April 27, 2004, Mr. Siebert asked the DOE for "all documents of any kind relating to the Israeli Nuclear Weapons Program." The request was forwarded to the Office of Intelligence for action. In its December 14, 2005 response, the Office of Intelligence stated that "the Department can neither confirm nor deny the existence of information on the requested subject. Such confirmation or denial of records at issue would pose a threat to national security . . . [and] could cause diplomatic tension between Israel and the United States." It stated that its response was based on Exemption 1 of the FOIA.\* The present Appeal seeks the disclosure of responsive information. Mr. Siebert points out in his Appeal that if responsive documents contain classified information that may properly be withheld under an exemption of the FOIA, that information should be redacted from the

---

\* The response also referred to Exemption 3 of the FOIA. We do not address Exemption 3 in this determination, because we have determined that the appropriate response regarding all information Mr. Siebert seeks in his request is to neither confirm nor deny its existence under Exemption 1.

documents and the remainder provided to him.

## II. Analysis

Although the Department rarely responds to requests for information in this manner, the Office of Intelligence's statement that it will neither confirm nor deny the existence of records responsive to Mr. Siebert's request is not without precedent. *See, e.g., A. Victorian*, 25 DOE ¶ 80,188 (1996). This type of response is commonly called a *Glomar* response, which refers to the first instance in which the adequacy of such a response was upheld by a Federal Court. In *Phillippi v. CIA*, the agency responded to a request for documents pertaining to a submarine-retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the existence of any such documents. *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). Agencies have typically used this response where the existence or non-existence of requested documents is itself a classified fact exempt from disclosure under Exemptions 1 and 3 of the FOIA, *see, e.g., id.* at 1012, or where admission that documents exist would indicate that the agency was involved in a certain issue, *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982), or that an individual is the target of investigation or surveillance, *Marrera v. Department of Justice*, 622 F. Supp. 51 (D.D.C. 1985).

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *see* 10 C.F.R. § 1004.10(b)(1). Executive Order 12958, as amended by Executive Order 13292, is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure under Exemption 1.

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). As the result of reorganization within the Department, this function is now the responsibility of the Deputy Director of the Office of Security and Safety Performance Assurance (Deputy Director). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Director reviewed the Office of Intelligence's response to Mr. Siebert's request for information. Based on the Deputy Director's review, we have determined that Executive Order 12958 requires the DOE to continue to neither confirm nor deny the existence of information responsive to Mr. Siebert's request. The denying official for the DOE's response on appeal is Mr. Michael A. Kilpatrick, Deputy Director, Office of Security and Safety Performance Assurance, Department of Energy.

Although a finding of exemption from mandatory disclosure generally requires our

subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 1, the disclosure is prohibited by executive order. Mr. Siebert has raised additional arguments in his Appeal in support of the search for and release of responsive documents that he maintains must exist. By affirming the Office of Intelligence's *Glomar* response, we need not address these arguments, because we are not acknowledging the existence of any such documents. Accordingly, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Arlie B. Siebert on January 27, 2006, Case No. TFA-0146, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: September 21, 2006